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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ARTURO MAYA PEREZ,

Defendant and Appellant.

H045775

(Santa Clara County

Super. Ct. Nos. 216335, C1647669)

**I. INTRODUCTION**

Defendant Arturo Maya Perez appeals after pleading no contest to carjacking (Pen. Code, § 215),<sup>1</sup> driving in willful or wanton disregard for the safety of persons or property while fleeing from a pursuing peace officer (Veh. Code, § 2800.2, subd. (a)), and misdemeanor resisting, delaying, or obstructing a peace officer (§ 148, subd. (a)(1)) in case No. C1647669, and to first degree burglary (§§ 459, 460, subd. (a)) in case No. 216335.<sup>2</sup> Defendant also admitted four prior strike convictions (§§ 667, subds. (b)-(i), 1170.12), a prior serious felony conviction (§ 667, subd. (a)), and a prior prison term (§ 667.5, subd. (b)). The trial court sentenced defendant to an aggregate term of 43 years to life.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> Although the two cases were consolidated by the trial court before the defendant's no contest pleas, the minute orders post-consolidation continue to reflect separate case numbers.

On appeal, defendant contends that the trial court abused its discretion when it denied his motion to strike his prior strike convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) in case No. C1647669; his sentence constitutes cruel and unusual punishment in violation of the federal and state constitutions; and the cases must be remanded to permit the trial court to exercise its newly enacted discretion to strike his prior serious felony conviction. For reasons that we shall explain, we will reverse and remand both matters for resentencing to allow the trial court to exercise its discretion in each case regarding whether to strike defendant's prior serious felony conviction.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

### **A. *The Current Offenses*<sup>3</sup>**

On the evening of August 25, 2016, when Sibane Parcels returned to her residence in San Jose, she noticed her front door had been damaged and forced open. Parcels discovered that costume jewelry worth \$100 and her social security card were missing. Fingerprints found on Parcels's jewelry box matched defendant.

On September 21, 2016, defendant, posing as a prospective buyer, asked Angel Hernandez if he could drive the Jeep that Hernandez was trying to sell. Hernandez agreed. Defendant got into the vehicle, bringing with him a yellow plastic bag. Shortly after defendant began driving, he stopped at a residence and asked Hernandez to knock on the door. Hernandez refused. Defendant then drove to a Safeway and told Hernandez that his girlfriend, Maria Guillen, was inside the store “ ‘getting the money.’ ” At some point, Guillen got into the vehicle.

Defendant and Guillen spoke in “ ‘code’ ” to each other, which made Hernandez nervous. Hernandez told defendant that he needed to go home. Defendant stopped the vehicle and said to Hernandez, “ ‘[T]his is your chance now. I'm gonna keep the car.

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<sup>3</sup> We rely on the probation report for the facts of the current offenses.

I have a gun. Get out!’ ” Hernandez initially refused, but then defendant yelled to Guillen, “ ‘[G]et it out, do it!’ ” Guillen retrieved the yellow plastic bag defendant had brought with him, and defendant pressed the bag against the back of Hernandez’s head. Hernandez was fearful for his life because he thought there was a gun inside the bag. Hernandez exited the vehicle and called the police.

Soon afterwards, the police observed Hernandez’s Jeep. The police initiated a vehicle stop, but defendant would not stop the car. Defendant then crashed into a parked vehicle. Defendant and Guillen exited the Jeep. Guillen lay down on the ground but defendant fled on foot, ignoring orders to stop. The unoccupied Jeep began to reverse and collided with a mailbox.

A search of Guillen’s cellular phone revealed text messages with defendant about “ ‘jacking’ ” someone. Defendant was apprehended on November 4, 2016.

**B. *The Charges and Pleas***

In case No. 216335, defendant was indicted on a charge of first degree burglary (§§ 459, 460, subd. (a)). The indictment also alleged that defendant had suffered four prior strike convictions (§§ 667, subds. (b)-(i), 1170.12), four prior serious felony convictions (§ 667, subd. (a)), and two prior prison terms (§ 667.5, subd. (b)).

In case No. C1647669, defendant was charged with carjacking (§ 215; count 1); driving in willful or wanton disregard for the safety of persons or property while fleeing from a pursuing peace officer (Veh. Code, § 2800.2, subd. (a); count 2); and misdemeanor resisting, delaying, or obstructing a peace officer (§ 148, subd. (a)(1); count 3). It was also alleged that defendant had suffered four prior strike convictions (§§ 667, subds. (b)-(i), 1170.12), a prior serious felony conviction (§ 667, subd. (a)), and a prior prison term (§ 667.5, subd. (b)).

On October 31, 2017, the trial court granted the prosecution’s motion to consolidate the cases. On November 20, 2017, at the prosecution’s request, the trial court dismissed three of the prior serious felony conviction allegations and one of the prior

prison term allegations in case No. 216335. Defendant then pleaded no contest to first degree burglary in case No. 216335 and to carjacking, driving in willful or wanton disregard for the safety of persons or property while fleeing from a pursuing peace officer, and misdemeanor resisting, delaying, or obstructing a peace officer in case No. C1647669. Defendant admitted four prior strike convictions, a prior serious felony conviction, and a prior prison term.

**C.     *The Probation Report***

The probation report summarized defendant's criminal record, which began in 2009. Defendant had eight prior felony convictions: three convictions for first degree burglary; a conviction for attempted first degree burglary; two convictions for possession of a controlled substance for sale; a conviction for unlawful possession of ammunition; and a conviction for possession of stolen property. Defendant also had 17 prior misdemeanor convictions. Defendant committed the current offenses while on parole.

The probation department recommended that defendant be sentenced to an aggregate term of 68 years to life.

**D.     *The Romero Motion and Opposition***

Defendant filed a *Romero* motion requesting that the trial court strike the four prior strike convictions he had admitted in both cases in the interests of justice pursuant to section 1385. His request was based on the severity of the sentence he faced for the current offenses, which far exceeded the sentences he had received for his prior convictions; his personal history, which included the untimely death of his father and a lack of resources; his difficulty finding work due to his immigration status; his history of substance abuse; and his programming while in custody on the current offenses.

Defendant also contended that sentencing him pursuant to the "Three Strikes" law would violate the federal and state prohibitions against cruel and unusual punishment. Defendant argued that an indeterminate sentence under the Three Strikes law would be grossly disproportionate to the crimes committed and the four-year sentence imposed for

his four prior strike convictions. Defendant observed that if the trial court struck three of the prior strike convictions, he faced a minimum determinate term of 15 years and a maximum determinate term of 27 years.

The prosecution filed written opposition to defendant's *Romero* motion. The prosecution referred to defendant's numerous prior convictions, asserting defendant's criminal history was an "unrelenting record of recidivism," and argued that defendant's offenses had increased in severity. The prosecution also observed that defendant had spent the majority of his adult life either in custody or on probation, and had committed his four prior strike offenses within a four-month period in 2014. Defendant was sentenced for his most recent prior convictions on October 7, 2015, and committed the current offenses in August and September 2016.

The prosecution characterized the current offenses as "egregious and invasive," noting that defendant committed the offenses while on parole. The prosecution argued that defendant's prospects were "slight" and defendant had not shown "any ability or desire to reform."

#### **E.     *The Romero Hearing and Sentencing***

At the outset of the sentencing hearing, the trial court stated that it had read and considered the probation report, defendant's *Romero* motion, and the prosecution's opposition. The court also noted that it had received documents from the California Department of Corrections and Rehabilitation regarding defendant's participation in programming.

Defendant's girlfriend, Maria Del Carmen, asked the trial court to give defendant a second chance and stated that defendant had changed.

Defendant argued that the death of his father when defendant was around 20 years old was extremely detrimental for him. After his father's death, defendant immigrated to the United States from Mexico to earn money for his family. Defendant had no family support in the United States, which he found very challenging, and was exposed to drugs

for the first time. Defendant stated that his contact with the criminal justice system began when he started experimenting with drugs and alcohol.

Defendant referred to the fact that he was sentenced on his prior residential burglary convictions “all at one time” and received a four-year sentence. Defendant stated that the past 10 years had been difficult for him, but he had started to build community support in the Bay Area. Defendant asked the court to sentence him to a determinate sentence so that one day he would be paroled.

The prosecution asserted that defendant “falls squarely within what [the] Three Strike[s] Law contemplates.” The prosecution argued that defendant’s conduct had escalated, observing that in addition to committing another first degree burglary, defendant committed a carjacking, “an even more serious, more violent act.” The prosecution also stated that defendant “already has had his chance.”

The trial court partially granted defendant’s *Romero* motion in case No. 216335, striking three of the four prior strike convictions. The court stated that its decision to strike the prior strike convictions was based on the filed materials and statements made at the hearing; the nature and circumstances of the prior strike convictions; the punishment defendant received for the prior strike convictions; the nature and circumstances of the current residential burglary, which occurred when no one was home and involved a relatively small amount of property; and defendant’s rehabilitative efforts in custody.

The trial court denied defendant’s *Romero* motion in case No. C1647669. The court stated that it had considered the nature and circumstances of the current offenses and the prior strike convictions and defendant’s background, character, and prospects for the future. The court found “that the manner in which th[e] crime was committed, the impact on the victim . . . , the seriousness of the offense, the threat and use of a weapon, the participation of multiple individuals to commit the crime, the coordination, the flight from law enforcement and the totality of the circumstances make this particular case . . . more aggravated in terms of considering the defendant’s *Romero*-type of request. [¶]

It does appear to show an increasing degree of criminal conduct, a heightened level of violence and/or threatened violence compared to the strike priors and the defendant's past criminal history. It was committed at a time when the defendant was on parole for serious violations with poor performance under prior grants of supervision. And it was committed shortly in time after the defendant committed the offense in [case No.] 216335. [¶] The Court cannot find within the interest of justice reasons to grant the defendant's *Romero* request in this docket. The Court believes that on this docket the defendant does fall within the spirit of the Three Strikes sentencing scheme. . . ." (Italics added.)

In case No. 216335, the trial court sentenced defendant to eight years for the burglary plus an additional five years for his prior serious felony conviction. The court struck the punishment for the prior prison term enhancement.

In case No. C1647669, the trial court sentenced defendant to 25 years to life for the carjacking plus five years for his prior serious felony conviction. The court imposed a concurrent four-year term for the willful and wanton disregard for the safety of persons or property while fleeing from police. The court struck the punishment for the prior prison term enhancement.

The total aggregate term imposed was 43 years to life.

### **III. DISCUSSION**

#### **A. The *Romero* Motion**

Defendant contends that the trial court abused its discretion when it denied his *Romero* motion in case No. C1647669. Defendant argues that the trial court improperly considered the aggravated nature of the current offense. Defendant also asserts that the record demonstrates that he "falls outside the spirit of the Three Strikes Law's life term provision."

Section 1385 authorizes a trial court to strike prior strike convictions "in furtherance of justice." (*Romero, supra*, 13 Cal.4th at pp. 504, 529, 530.) That

discretion, however, is “limited.” (*Id.* at p. 530.) “[T]he Three Strikes initiative, as well as the legislative act embodying its terms, was intended to restrict courts’ discretion in sentencing repeat offenders.” (*Id.* at p. 528.) “To achieve this end, ‘the Three Strikes law does not offer a discretionary sentencing choice, as do other sentencing laws, but establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court “conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he [or she] actually fell outside the Three Strikes scheme.” ’ [Citation.]” (*People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*).)

In exercising its discretion, the trial court must “ ‘consider[ ] both . . . the constitutional rights of the defendant, and the interests of society represented by the People. . . .” ’ ” (*Romero, supra*, 13 Cal.4th at p. 530, italics omitted.) The trial court must accord “preponderant weight . . . to factors intrinsic to the [Three Strikes] scheme, such as the nature and circumstances of the defendant’s present felonies and prior serious and/or violent felony convictions, and the particulars of his [or her] background, character, and prospects.” (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).) “[N]o weight whatsoever may be given to factors extrinsic to the scheme, such as the mere desire to ease court congestion or, a fortiori, bare antipathy to the consequences for any given defendant. [Citation.]” (*Ibid.*) Ultimately, the trial court must determine whether “the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he [or she] had not previously been convicted of one or more serious and/or violent felonies.” (*Ibid.*)

We review a trial court’s discretionary sentencing choices, including its refusal to strike a prior strike conviction, for abuse of discretion. (*Carmony, supra*, 33 Cal.4th at p. 375.) “In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, ‘ “[t]he burden is on the party attacking the sentence to clearly show that



the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.” ’ [Citations.] Second, a “decision will not be reversed merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’ ” ’ [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at pp. 376-377.)

“[A] trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not ‘aware of its discretion’ to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation].” (*Carmony, supra*, 33 Cal.4th at p. 378.) An abuse of discretion also occurs where the trial court “strikes a sentencing allegation[ ] solely ‘to accommodate judicial convenience or because of court congestion,’ ” or “simply because a defendant pleads guilty.” (*Romero, supra*, 13 Cal.4th at p. 531.)

On the other hand, “[w]here the record is silent [citation], or ‘[w]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court’s ruling, even if we might have ruled differently in the first instance’ [citation]. Because the circumstances must be ‘extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he [or she] squarely falls once he [or she] commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack’ [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary. Of course, in such an extraordinary

case—where the relevant factors . . . manifestly support the striking of a prior conviction and no reasonable minds could differ—the failure to strike would constitute an abuse of discretion.” (*Carmony, supra*, 33 Cal.4th at p. 378.)

Here, we conclude that the trial court did not abuse its discretion when it denied defendant’s *Romero* motion in case No. C1647669. The record demonstrates that the trial court understood its discretion and weighed the *Williams* factors. The court stated that it had considered the nature and circumstances of the current offenses and defendant’s prior strike convictions, as well as defendant’s background, character, and prospects for the future. The court evaluated “the manner in which th[e] [current] crime was committed, the impact on the victim . . . , the seriousness of the offense, the threat and use of a weapon, the participation of multiple individuals to commit the crime, the coordination, the flight from law enforcement and the totality of the circumstances.” It determined that the current offenses “show[ed] an increasing degree of criminal conduct, a heightened level of violence and/or threatened violence compared to the strike priors and the defendant’s past criminal history.” The court also considered that defendant committed the current offense “at a time when the defendant was on parole for serious violations with poor performance under prior grants of supervision” and that the offense was “committed shortly in time after [he] committed the offense in [case No.] 216335.” The court concluded that it could not find that defendant fell outside the spirit of the Three Strikes law.

Defendant contends that it was an abuse of discretion for the trial court to determine that the carjacking in case No. C1647669 was more aggravated than the burglary perpetrated in case No. 216335. Defendant argues that the Three Strikes law “punishes recidivism”; it “is not intended to punish a felon based on the aggravated nature of his triggering offense.” However, the California Supreme Court has specifically directed trial courts determining *Romero* motions to consider “whether, *in light of the nature and circumstances of his [or her] present felonies* and prior serious

and/or violent felony convictions, and the particulars of his [or her] background, character, and prospects, the defendant may be deemed outside the [Three Strike] scheme's spirit, in whole or in part, and hence should be treated as though he [or she] had not previously been convicted of one or more serious and/or violent felonies.” (*Williams, supra*, 17 Cal.4th at p. 161, italics added.) In addition, in *People v. Garcia* (1999) 20 Cal.4th 490, 499, the court stated that “the standards [it] enunciated in *Williams* indicate that a trial court has discretion in a Three Strikes case to strike prior conviction allegations on a count-by-count basis. In *Williams*, we instructed trial courts to consider among other things, ‘ “ ‘individualized considerations’ ” ’ [citation] ‘such as the nature and circumstances of the defendant’s present felonies’ and his ‘prospects.’ [Citation.] In many cases, ‘the nature and circumstances’ of the various felonies described in different counts will differ considerably. *A court might therefore be justified in striking prior conviction allegations with respect to a relatively minor current felony, while considering those prior convictions with respect to a serious or violent current felony.*” (Italics added.)

Moreover, we reasonably interpret the trial court’s statement that the circumstances of the offenses in case No. C1647669 made the case “more aggravated in terms of considering the defendant’s *Romero*-type of request,” as an explanation of why the court was denying defendant’s *Romero* motion in that case when it had partially granted his motion in case No. 216335. In fact, the court began its decision in case No. C1647669 by stating that “[t]his docket is more difficult for the Court.” There is no indication in the record that the court decided defendant’s *Romero* motion in case No. C1647669 based on the nature of the offenses in that case relative to the nature of the offense in case No. 216335. Rather, the trial court denied defendant’s *Romero* motion in

case No. C1647669 based on the nature and circumstances of the offenses, defendant's criminal history and strike priors, and defendant's background and future prospects.<sup>4</sup>

Defendant also contends that the trial court abused its discretion because the record demonstrates that he "falls outside the spirit of the Three Strikes Law's life term provision." Defendant asserts that "the record does not support a sol[i]d credible inference [he] used a weapon"; his "reckless flight from pursuing police . . . is not directly relevant to recidivism"; there is no evidence that anyone was endangered by his flight; "there is no evidence [he] ever had and rejected the benefit of an actual [drug] program"; and his "criminal history is short."

However, we may not substitute our judgment for that of the trial court. (*Carmony*, *supra*, 33 Cal.4th at pp. 379-380.) As in *Carmony*, "the trial court in this case refused to strike defendant's prior convictions based on factors allowed under the law and fully supported by the record."<sup>5</sup> (*Id.* at p. 379.) Its decision was not "so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at p. 377.)

For these reasons, we determine that the trial court did not abuse its discretion when it denied defendant's *Romero* motion in case No. C1647669.

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<sup>4</sup> Because we find that the trial court did not deny defendant's *Romero* motion in case No. C1647669 based on the seriousness of the offenses in that case compared to the seriousness of the offense in case No. 216335, we do not reach the Attorney General's contention that defendant's claim that the trial court improperly compared the carjacking to the burglary has been forfeited.

<sup>5</sup> The record supports a reasonable inference that defendant used a gun in the commission of the carjacking. Hernandez reported to police that when defendant told him to get out of the car, defendant said that he had a gun. Defendant then pressed a bag to the back of Hernandez's head, which Hernandez thought contained a gun.

Moreover, when the trial court stated in ruling on defendant's *Romero* motion that the current offense involved "the threat and use of a weapon," defendant did not object, thus waiving any claim that the court's "stated reasons" did "not apply" to this case. (*People v. Scott* (1994) 9 Cal.4th 331, 353.)

## **B. *Cruel and Unusual Punishment***

Defendant contends that his 43-year-to-life sentence constitutes cruel and unusual punishment in violation of the federal and state constitutions because it is grossly disproportionate to his offenses, even when his recidivism is taken into consideration.<sup>6</sup>

“Cruel and unusual punishment is prohibited by the Eighth Amendment to the United States Constitution and article I, section 17 of the California Constitution. Punishment is cruel and unusual if it is so disproportionate to the crime committed that it shocks the conscience and offends fundamental notions of human dignity. [Citation.]” (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 358, fns. omitted; see also *Ewing v. California* (2003) 538 U.S. 11, 20, 23 (*Ewing*).)

“The Eighth Amendment, which forbids cruel and unusual punishments, contains a ‘narrow proportionality principle’ that ‘applies to noncapital sentences.’ [Citations.]” (*Ewing, supra*, 538 U.S. at p. 20, citing *Harmelin v. Michigan* (1991) 501 U.S. 957, 996-997 (*Harmelin*).) “ ‘The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are “grossly disproportionate” to the crime.’ [Citation.]” (*Ewing, supra*, at p. 23.)

California’s Constitution sets a similar standard. “[I]n California a punishment may violate article I, section 6, of the Constitution if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the

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<sup>6</sup> The Attorney General contends that defendant’s cruel and unusual punishment claim is forfeited because defendant failed to contemporaneously object to his sentence on this ground when it was imposed below. The Attorney General observes that defendant solely raised this claim in his written *Romero* motion, where he asserted that a 50-year-to-life sentence would be unconstitutional. The Attorney General argues that defendant was required to object to the 43-year-to-life sentence actually imposed in order to preserve claim. Because defendant asserted as a separate claim in his written *Romero* motion that an indeterminate sentence imposed under the Three Strikes law would constitute cruel and unusual punishment, we determine that the issue was sufficiently preserved.

conscience and offends fundamental notions of human dignity.” (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted.) “The main technique of analysis under California law is to consider the nature both of the offense and of the offender. [Citation.] The nature of the offense is viewed both in the abstract and in the totality of circumstances surrounding its actual commission; the nature of the offender focuses on the particular person before the court, the inquiry being whether the punishment is grossly disproportionate to the defendant’s individual culpability, as shown by such factors as age, prior criminality, personal characteristics, and state of mind. [Citations.]” (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494 (*Martinez*).)

“The judicial inquiry commences with great deference to the Legislature. Fixing the penalty for crimes is the province of the Legislature, which is in the best position to evaluate the gravity of different crimes and to make judgments among different penological approaches. [Citations.]” (*Martinez, supra*, 76 Cal.App.4th at p. 494; see also *Ewing, supra*, 538 U.S. at p. 25.)

Whether a sentence constitutes cruel and unusual punishment is a question of law. (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1474.) A reviewing court therefore applies the de novo standard of review when determining whether a defendant’s sentence is cruel and unusual. (*Ibid.*)

Here, we determine that defendant’s sentence does not constitute cruel and unusual punishment under the federal or state constitution.

We find *Ewing* instructive. There, the United States Supreme Court considered punishment imposed under California’s Three Strikes law. (*Ewing, supra*, 538 U.S. at p. 20.) The defendant was convicted of grand theft of three golf clubs worth \$399 each. (*Id.* at p. 18.) The defendant’s criminal history spanned from 1984 to 1993 and included misdemeanor and felony convictions for petty theft, auto theft, battery, burglary, robbery, possession of drugs, trespass, and unlawful possession of a firearm. (*Id.* at pp. 18-19.) The trial court imposed 25 years to life. (*Id.* at p. 20.) The Supreme Court explained that

in enacting the Three Strikes law, the California Legislature “made a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime. Nothing in the Eighth Amendment prohibits California from making that choice.” (*Id.* at p. 25.)

In addressing the gravity of the offense compared to the harshness of the penalty, the Supreme Court emphasized that the gravity of the defendant’s offense included not only his current felony, but also his history of having been convicted of at least two violent or serious felonies. (*Ewing, supra*, 538 U.S. at pp. 28-29.) “In imposing a three strikes sentence, the State’s interest is not merely punishing the offense of conviction, or the ‘triggering’ offense: ‘[I]t is in addition the interest . . . in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law.’ ” (*Id.* at p. 29.) The court found that “Ewing’s sentence is justified by the State’s public-safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record.” (*Id.* at pp. 29-30, fn. omitted.) Therefore, the court held that “Ewing’s sentence of 25 years to life in prison, imposed for the offense of felony grand theft under the three strikes law, is not grossly disproportionate and therefore does not violate the Eighth Amendment’s prohibition on cruel and unusual punishments.” (*Id.* at pp. 30-31.)

Likewise, defendant’s sentence here is amply supported by the seriousness of the offenses and his criminal history. Defendant, while on parole for four prior strike convictions, committed two new strike offenses, a first degree burglary and a carjacking, in two separate incidents. (§§ 667.5, subd. (c)(17), 1192.7, subd. (c)(18), (27).) The carjacking involved the threat of a weapon and culminated in defendant’s reckless flight from the police. In addition to defendant’s four prior strike convictions, three of which were for residential burglary and one of which was for attempted residential burglary, defendant had four other felony convictions and 17 misdemeanor convictions.

Defendant argues that his 43-year-to-life sentence “is a de facto sentence of life without possibility of parole.” Even assuming that were true, however, it does not render the sentence unconstitutional. “[T]he combined effect of [defendant’s] age and the length of the sentence are of no consequence” in determining whether a sentence is grossly disproportionate. (*People v. Szadzewicz* (2008) 161 Cal.App.4th 823, 845; see also, e.g., *People v. Byrd* (2001) 89 Cal.App.4th 1373, 1382-1383 [determinate sentence of 115 years plus 444 years to life not unconstitutional].)

Defendant undertakes interjurisdictional and intrajurisdictional analyses to demonstrate that his punishment is cruel and unusual. However, in *Harmelin*, which involved a defendant convicted of possessing 672 grams of cocaine and sentenced to a mandatory term of life in prison without possibility of parole, the Supreme Court stated that “intrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.” (*Harmelin, supra*, 501 U.S. at pp. 961, 1005.) The court found that “the Michigan Legislature could with reason conclude that the threat posed to the individual and society by possession of this large an amount of cocaine—in terms of violence, crime, and social displacement—is momentous enough to warrant the deterrence and retribution of a life sentence without parole,” and determined that, “[i]n light of the gravity of [the defendant’s] offense, a comparison of his crime with his sentence does not give rise to an inference of gross disproportionality.” (*Id.* at pp. 1003, 1005.) We make the same determination here.

On this record, we conclude that defendant’s sentence of 43 years to life, imposed for the felony offenses of carjacking and burglary, is not grossly disproportionate and does not violate the federal and state prohibitions against cruel and unusual punishment.

### **C. Prior Serious Felony Conviction Enhancement**

As stated above, the trial court imposed consecutive five-year terms under section 667, subdivision (a) in case Nos. 216335 and C1647669, as was statutorily



required when defendant was sentenced. (Former §§ 667, subd. (a)(1), amend. approved by voters, Prop. 36, § 2, eff. Nov. 7, 2012; § 1385, subd. (b), added by Stats. 2014, ch. 137, § 1.) “On September 30, 2018, the Governor signed Senate Bill [No.] 1393 which, effective January 1, 2019, amend[ed] sections 667(a) and 1385(b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.)” (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).) Defendant contends remand is required to permit the trial court to exercise its discretion to strike his prior serious felony conviction. The Attorney General agrees.

Under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), “[w]hen the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute’s operative date.” (*People v. Brown* (2012) 54 Cal.4th 314, 323, fn. omitted.) “The rule in *Estrada* has been applied to statutes governing penalty enhancements, as well as to statutes governing substantive offenses.” (*People v. Nasalga* (1996) 12 Cal.4th 784, 792.) Because nothing in Senate Bill No. 1393 suggests a legislative intent that the amendments to sections 667, subdivision (a), and 1385, subdivision (b), apply prospectively only, “it is appropriate to infer, as a matter of statutory construction, that the Legislature intended Senate Bill [No.] 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when Senate Bill [No.] 1393 becomes effective on January 1, 2019.” (*Garcia, supra*, 28 Cal.App.5th at p. 973.) Defendant’s cases were not final on January 1, 2019. (See *People v. Vieira* (2005) 35 Cal.4th 264, 306 [“ ‘a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed. [Citations.]’ ”].)

“ ‘Defendants are entitled to sentencing decisions made in the exercise of the “informed discretion” of the sentencing court. [Citations.]’ ” (*People v. Gutierrez* (2014)

58 Cal.4th 1354, 1391.) When the record shows that the trial court proceeded with sentencing on the assumption that it lacked discretion, remand for resentencing is necessary “unless the record ‘clearly indicate[s]’ that the trial court would have reached the same conclusion ‘even if it had been aware that it had such discretion.’ [Citations.]” (*Ibid.*)

The record before us does not clearly indicate that in case Nos. 216335 and C1647669 the trial court would have declined to strike defendant’s prior serious felony conviction if it had the discretion to do so for the purposes of sentencing him under section 667, subdivision (a). (Cf. *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [declining to remand for resentencing because “the trial court indicated that it would not, in any event, have exercised its discretion to lessen the sentence”].) Accordingly, we agree with the parties that remand is appropriate to allow the trial court to exercise its discretion regarding whether to strike defendant’s prior serious felony conviction for sentencing purposes.

#### **IV. DISPOSITION**

The judgment is reversed and the matters are remanded for resentencing. The trial court shall determine in each case whether to exercise its discretion pursuant to Penal Code section 1385 to strike defendant’s prior serious felony conviction for the purposes of sentencing him under Penal Code section 667, subdivision (a).

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MIHARA, J.

***People v. Perez***  
**H045775**